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EXAMINER

COTTON, ABIGAIL MANDA

ART UNIT PAPER NUMBER

1617

DATE MAILED: 06/02/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 09/884,949	<b>Applicant(s)</b> AFRIAT, ISABELLE	
	<b>Examiner</b> Abigail M. Cotton	<b>Art Unit</b> 1617	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 20 March 2006.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-33 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |                                                                                                                        |                                                                                         |
|------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                            | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____                                                |

### **DETAILED ACTION**

This office action is in response to the amendment and remarks filed March 20, 2006. Claims 1-33 are pending in the application and are being examined on the merits herein.

The rejection of claims 1-22 and 25-30 under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,567,462 to Naduad et al. is being withdrawn in view of Applicants' amendments to the claims. In particular, Naduad et al. does not specifically teach an emulsion comprising the specific dimethicone copolyol having the chemical formula as recited in the claims. The rejection of claims 23 and 24 under 35 U.S.C. 103(a) as being unpatentable over Naduad et al. in view of The Condensed Chemical Dictionary is similarly being withdrawn.

Applicants' amendments to the claims have required the following rejections.

#### ***Claim Objections***

Claims 1-2, 9, 16 and 30 are objected to due to a typo-type error. In particular, the claims recite "p is a is a number from 1 to 10" (underline added), which is grammatically incorrect. Appropriate correction is required.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-22 and 25-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over FR 2 767 693 to Afriat et al, published March 5, 1999, (U.S. Patent No. 6,239,174 is being referred to herein as the translation of this reference), in view of U.S. Patent No. 5,851,539 to Mellul et al, issued December 22, 1998.

Afriat et al. teaches a water-in-oil emulsion containing an emulsifier that is a dimethicone copolyol that can be used for a cosmetic process in treating skin (see abstract, in particular), and thus teaches a water-in-oil emulsion having a silicone emulsifier, as recited in claim 1. Regarding part (1) of claim 1, Afriat et al. teaches that the aqueous phase can comprise from 25 to 90% of the emulsion, such as 85% by weight of the emulsion (see column 4, lines 23-30, in particular), and thus teaches the aqueous phase that is at least 80%, as recited in claim 1.

Regarding part (2) of claim 1, Afriat et al. teaches that the emulsifier can comprise from 0.5 to 25% of the emulsion, such as 1% (see column 3, lines 24-30, in

Art Unit: 1617

particular), and the oily phase can be provided in an proportion of from 3 to 75% of the total weight of the emulsion, such as 10% or 15% (see column 5, lines 4-8, in particular), and thus teaches providing the oily phase and emulsifier in a weight ratio of greater than or equal to 5, as recited in claim 1. Furthermore, it is considered that one of ordinary skill in the art at the time the invention was made would have found it obvious to vary and/or optimize the ratio of oily phase to emulsifier provided in the composition, according to the guidance provided by Afriat et al, to provide a composition having desired properties, such as desired cosmetic properties. It is noted that "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955.)

Regarding part (3) of claim 1, Afriat et al. teaches that the silicone-based emulsifier is preferably a dimethiconecopolyol (see column 2, lines 60-67, in particular). Afriat et al. also teaches that such dimethicone copolyol emulsifiers include Q2-3225C by Dow Corning (see column 3, lines 9-20, in particular.)

Afriat et al. does not teach that the dimethicone copolyol emulsifier is the specific dimethicone copolyol emulsifier as recited in claim 1.

Mellul et al. teaches water in oil type emulsions for cosmetics (see abstract, in particular.) Mellul et al. teaches that suitable emulsifiers for such emulsions include

dimethicone copolyols such as Q2-3225C by Dow Corning and KF 6015 by Shin Etsu (see column 8, lines 10-50, in particular), which is a dimethicone copolyol that meets the structural limitations recited in claim 1, as disclosed on pages 6-7 of Applicants' specification. Thus, Mellul et al. teaches that the particular dimethicone copolyol KF 6015 is suitable as an emulsifier for a water-in-oil emulsion, and furthermore is interchangeable with the emulsifier Q2-3225C by Dow Corning.

Thus, one of ordinary skill in the art at the time the invention was made would have found it obvious to provide the dimethicone copolyol emulsifier of Mellul et al. in the composition of Afriat et al, because Afriat et al. teaches that the oil-in-water emulsion comprises a dimethicone copolyol emulsifier such as that in Q2-3225C by Dow Corning, and Mellul et al. teaches that the instantly claimed emulsifier is suitable to emulsify water-in-oil compositions, and is interchangeable with the Q2-3225C emulsifier as taught by Afriat et al. Accordingly, one of ordinary skill in the art at the time the invention was made would have been motivated to provide the instant emulsifier in the form of KF-6015 in the water in oil composition of Afriat et al, with the expectation of providing a suitable dimethicone copolyol emulsifier for the composition. Thus, claim 1 is obvious over Afriat et al. and Mellul et al.

Regarding claim 2, Afriat et al. and Mellul teach a composition comprising the aqueous phase, oily phase, and dimethicone copolyol emulsifier in the ranges as claimed, and thus render the composition obvious. Regarding claims 9 and 16, Afriat et

Art Unit: 1617

al. teaches the composition can be applied to skin and provides benefits such as tonifying and regenerating the skin (see abstract and column 2, lines 35-45, in particular), and thus one of ordinary skill in the art would have found it obvious to apply the composition to skin, including greasy skin, to impart the skin care benefits to the skin. Regarding claim 30, Afriat et al. teaches a composition that is a water-in-oil emulsion, and thus that "consists of" a water-in-oil emulsion, as recited in the claim.

Regarding claims 3, 10 and 17, it is noted that since the combined teachings of Afriat et al. and Mellul et al. render the claimed composition obvious, the property of such a claimed composition will also be rendered obvious by the prior art teachings, since the properties, namely the viscosity of the composition, are inseparable from its composition. Therefore, if the prior art teaches the composition or renders the composition obvious, then the properties are also taught or rendered obvious by the prior art. In re Spada, 911 F.2d 705, 709, 15 USPQ 1655, 1658 (Fed. Cir. 1990.) See MPEP 2112.01. The burden is shifted to Applicant to show that the prior art product does not possess or render obvious the same properties as the instantly claimed product.

Regarding claims 4, 11 and 18, it is noted that Afriat et al. teaches that the aqueous phase can be from 25 to 90%, such as 85% (see column 4, lines 22-28, in particular.) Accordingly, it is considered that one of ordinary skill in the art at the time the invention was made would have found it obvious to vary and/or optimize the amount

Art Unit: 1617

of water provided in the composition, according to the guidance provided by Afriat et al, to provide a composition having desired properties. It is noted that "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955.)

Regarding claims 5, 12 and 19, Afriat et al. teaches that the emulsifier can be present in an amount of from 0.5 to 25%, such as 1% (see column 3, lines 24-30, in particular), and thus teaches an amount that meets the range limitation of the claims. Regarding claims 6, 13 and 20, Afriat et al. teaches that the oily phase can be present in an amount of from 3 to 75%, such as 10 or 15% (see column 5, lines 4-8, in particular), and thus teaches an amount that meets the range limitation of the claims. Regarding claims 7, 14 and 21, Afriat et al. teaches that the emulsifier can be provided in an amount of 1% by weight and the oily phase can be in an amount of 10% by weight, as discussed above, and thus teaches a ratio that is greater than or equal to about 8, as recited in the claims. Furthermore, it is considered that one of ordinary skill in the art at the time the invention was made would have found it obvious to vary and/or optimize the amount and/or ratio of the emulsifier and/or oily phase provided in the composition, according to the guidance provided by Afriat et al, to provide a composition having desired properties. It is noted that "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges



Art Unit: 1617

by routine experimentation." In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955.)

Regarding claims 8, 15 and 22, Afriat et al. teaches that the oily phase can comprise a volatile silicon oil (see column 5, lines 20-33, in particular.)

Regarding claims 25-27, Afriat et al. teaches the composition can comprise a polyol, such as glycerol or propylene glycol (see column 5, lines 45-55, in particular.) Regarding claims 28-29, Afriat et al. teaches that sodium chloride can be provided in the composition.

Regarding claims 31-33, Afriat et al. and Mellul et al. teach providing the same dimethicone copolyol, KF 6015, that is taught in the specification as having the chemical formula as recited in the claims, and thus teach the composition of the claims.

Claims 23-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over FR 2 767 693 to Afriat et al, in view of U.S. Patent No. 5,851,539 to Mellul et al, as applied to claims 1-22 and 25-33 above, and further in view of Hawley, G.G., The Condensed Chemical Dictionary, 10 Ed., Van Nostran Reinhold Co. New York, NY, 1981, page 423 (of record.)

The disclosures of Afriat et al. and Mellul et al. are applied as discussed for claims 1-22 and 25-33 above. The references do not expressly disclose the employment of ethanol in the cosmetic emulsion or composition.

Hawley teaches that ethanol is a common ingredient in cosmetics and acts as a solvent for fats and oil.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to further employ ethanol with water in the cosmetic emulsion of composition of Afriat et al and Mellul et al. One having ordinary skill in the art at the time the invention was made would have been motivated to further employ ethanol with water in the cosmetic emulsion or composition of Afriat et al. and Mellul et al, because ethanol is well known to be a water-like solvent, being miscible with water, and a common ingredient in cosmetics and acts as a solvent for fats and oils as taught by Hawley. Thus, one of ordinary skill in the art would have been motivated to provided ethanol in the composition of Afriat et al. and Mellul et al. with the expectation of providing a suitable cosmetic component for the cosmetic formulation.

Claims 1-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over either (1) U.S. Patent Application Publication No. 2001/0012860 to Bleckmann et al, issued August 9, 2001, or (2) its foreign priority application DE 19852212, published May 18, 2000 (the Bleckmann et al. U.S. publication is being solely referred to herein as

Art Unit: 1617

an English language equivalent of the DE application), in view of U.S. Patent No. 5,851,539 to Mellul et al, issued December 22, 1998.

Bleckmann et al. teaches a water-in-oil emulsion with a water content and optionally water-soluble substances (aqueous phase) totaling at least 80% by weight of the preparation, and having a surface active substance (emulsifier) chosen from the group of alkyldimethicone copolyols and/or alkyldimethicone copolyols (see abstract and claim 1, in particular.)

Bleckmann et al. teaches that the weight ratio of the surface active substances to the lipid components (oily phase) is from 0.10 to 0.25 (see abstract and claim 1, in particular), which is equivalent to a ratio of the lipid phase (oily phase) to surface active substance (emulsifier) of from 4:1 to 10:1, which closely overlaps with the ratio of greater than or equal to 5, as recited in claim 1. It is furthermore noted that Bleckmann et al. exemplifies compositions having a ratio of the oily phase to the emulsifier of greater than 5, such as in Example 1 in which a ratio of the oily phase (cetyl dimethicone copolyol + caprylic acid/capric acid triglycerides + dicaprylyl ether + octyldodecanol) to the emulsifier (cetyldimethicone copolyol) is 11.50:1.50 ~ 7.7:1.

Thus, Bleckmann et al. teaches a water-in-oil emulsion having the aqueous phase, emulsifier and oily phase in the ranges as claimed. Bleckmann et al. further teaches that surface active substances (emulsifiers) suitable for the composition can

Art Unit: 1617

include the cetyldimethicone copolyol available under the tradename ABIL® EM 90 (see paragraph 0020, in particular.)

Bleckmann et al. does not teach the specific silicone emulsifier that is the dimethicone copolyol having the formula as recited in claim 1.

Mellul et al. teaches water in oil type emulsions for cosmetics (see abstract, in particular.) Mellul et al. teaches that suitable emulsifiers for such emulsions include those having the general formula (II), which includes both alkyldimethicone copolyols and dimethicone copolyols (see column 8, lines 10-55, in particular.) Mellul et al. teaches that such suitable emulsifiers include ABIL EM 90, which is the same emulsifier specifically exemplified by Bleckmann et al, as well as KF 6015 by Shin Etsu (see column 8, lines 38-50, in particular), which is the dimethicone copolyol described by Applicants in the instant specification as meeting the limitations of the chemical formula as recited in claim 1. Thus, Mellul et al. teaches that both the instantly claimed dimethicone copolyol and alkyl dimethicone copolyols such as the ABIL EM 90 also taught by Bleckmann et al. are suitable as emulsifiers for water-in-oil emulsions, and are interchangeable with one another.

Thus, one of ordinary skill in the art at the time the invention was made would have found it obvious to provide the dimethicone copolyol emulsifier of Mellul et al. in the composition of Bleckmann et al, because Bleckmann et al. teaches that the water-

Art Unit: 1617

in-oil emulsion can comprise an alkyl dimethicone copolyol emulsifier such as that in Abil EM 90, and Mellul et al. teaches that the instantly claimed emulsifier is suitable to emulsify water-in-oil compositions, and is interchangeable with alkyl dimethicone copolyol emulsifiers such as the Abil EM 90 emulsifier as taught by Bleckmann et al. Accordingly, one of ordinary skill in the art at the time the invention was made would have been motivated to provide the instant emulsifier in the form of KF-6015 in the water in oil composition of Bleckmann et al, with the expectation of providing a suitable emulsifier for the composition. Thus, claim 1 is obvious over Bleckmann et al. and Mellul et al.

Regarding claim 2, Bleckmann et al. and Mellul teach a composition comprising the aqueous phase, oily phase, and dimethicone copolyol emulsifier in the ranges as claimed, and thus render the composition obvious. Regarding claims 9 and 16, Bleckmann et al. teaches the composition can be applied to skin and provides benefits such as rebuilding the skin's natural barrier function and delaying skin aging (see paragraphs 0001-0007, in particular), and thus one of ordinary skill in the art would have found it obvious to apply the composition to skin, including greasy skin, to impart the skin care benefits to the skin. Regarding claim 30, Bleckmann et al. teaches a composition that is a water-in-oil emulsion, and thus that "consists of" a water-in-oil emulsion, as recited in the claim.

Regarding claims 3, 10 and 17, it is noted that since the combined teachings of Bleckmann et al. and Mellul et al. render the claimed composition obvious, the property of such a claimed composition will also be rendered obvious by the prior art teachings, since the properties, namely the viscosity of the composition, are inseparable from its composition. Therefore, if the prior art teaches the composition or renders the composition obvious, then the properties are also taught or rendered obvious by the prior art. In re Spada, 911 F.2d 705, 709, 15 USPQ 1655, 1658 (Fed. Cir. 1990.) See MPEP 2112.01. The burden is shifted to Applicant to show that the prior art product does not possess or render obvious the same properties as the instantly claimed product.

Regarding claims 4, 11 and 18, it is noted that Bleckmann et al. teaches that the content of water and optionally the water-soluble substances is at least 80% (see abstract and claim 1, in particular.) Furthermore, it is considered that one of ordinary skill in the art at the time the invention was made would have found it obvious to vary and/or optimize the amount of water provided in the composition, according to the guidance provided by Bleckmann et al, to provide a composition having desired properties. It is noted that "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955.)

Regarding claims 5, 12 and 19, Bleckmann et al. teaches that the emulsifier can be present in an amount of from 1 to 3% by weight (see paragraphs 0021-022, in particular), and thus teaches an amount that meets the range limitation of the claims. Regarding claims 6, 13 and 20, Bleckmann et al. teaches that the lipid phase is present in an amount of less than 20% by weight (see abstract and claim 1, in particular), exemplifies compositions having 11.5% by weight of an oily phase (see Example 1, in particular) and thus teaches an amount that meets the range limitation of the claims. Regarding claims 7, 14 and 21, Bleckmann et al. teaches the ratio of the lipid phase to emulsifier is desirably in a range of 4:1 to 10:1 (see abstract and claim 1, in particular), as discussed above, which overlaps with the range as recited, and exemplifies a composition having a ratio of ~7.1:1, which is very close to a range of greater than or equal to 8, as recited in the claims. Furthermore, it is considered that one of ordinary skill in the art at the time the invention was made would have found it obvious to vary and/or optimize the amount and/or ratio of the emulsifier and/or oily phase provided in the composition, according to the guidance provided by Bleckmann et al, to provide a composition having desired properties. It is noted that "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955.)

Regarding claims 8, 15 and 22, Bleckmann et al. teaches that the oily phase can comprise cyclomethicones such as cyclotetrasiloxane and cyclopentasiloxane (see paragraph 0036, in particular.)

Regarding claims 25-27, Bleckmann et al. teaches the composition can comprise a polyol, such as glycerol or propylene glycol (see paragraph 0043, in particular.)

Regarding claims 23-24, Bleckmann et al. teaches the composition can comprise ethanol (see paragraph 0043, in particular.) Regarding claims 28-29, Bleckmann et al. teaches that sodium chloride can be provided in the composition (see paragraph 0053, in particular.)

Regarding claims 31-33, Bleckmann et al. and Mellul et al. teach providing the same dimethicone copolyol, KF 6015, that is taught in the specification as having the chemical formula as recited in the claims, and thus teach the composition of the claims.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422



Art Unit: 1617

F.2d 438, 164 USPQ 619 (CCPA 1970); and In re Thorington, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-9 and 23-33 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-13 of U.S. Patent No. 6,465,510 in view of U.S. Patent No. 5,851,539 to Mellul et al, issued December 22, 1998.

The conflicting claims are not identical, they are not patentable distinct from each other because the patent is drawn to an emulsion and cosmetic composition for skin comprising the same ingredients including the emulsifier as herein, a dimethicone copolyol, in the same amounts. Thus, these emulsion and cosmetic composition between the parent and the instant application are seen to substantially overlap. While the patented claims do not recite the specific dimethicone copolyol as recited in the instant claims, Mellul et al. teaches that it is known to provide the instantly claimed dimethicone copolyol emulsifier in an emulsion composition, as has been discussed above. Accordingly, one of ordinary skill in the art would find it obvious to provide the emulsifier of Mellul et al. in the patented composition to arrive at the instantly claimed

Art Unit: 1617

composition, with the expectation of preparing a suitable emulsion composition, and thus the instant claims 1-9 and 23-33 are seen as obvious over the claims 1-13 of U.S. Patent No. 6,465,510.

Claims 1-33 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-16 of U.S. Patent No. 6,331,306 in view of U.S. Patent No. 5,851,539 to Mellul et al, issued December 22, 1998.

Although the conflicting claims are not identical, they are not patentably distinct from each other because the patent is drawn to an emulsion and cosmetic composition for skin comprising the same ingredients including the same emulsifier as herein, a dimethicone copolyol in the same amounts, and the same method or process of use of the composition as instantly claimed. While the patented claims do not recite the specific dimethicone copolyol as recited in the instant claims, Mellul et al. teaches that it is known to provide the instantly claimed dimethicone copolyol emulsifier in an emulsion composition, as has been discussed above. Accordingly, one of ordinary skill in the art would find it obvious to provide the emulsifier of Mellul et al. in the patented composition to arrive at the instantly claimed composition, with the expectation of preparing a suitable emulsion composition, and thus the instant claims 1-33 are seen to be obvious over the claims 1-16 of U.S. Patent No. 6,331,306 in view of Mellul et al.

Claims 1-9 and 23-29 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-34 of U.S. Patent No. 6,562,354 in view of U.S. Patent No. 5,851,539 to Mellul et al, issued December 22, 1998.

The claims are not patentably distinct from each other because the patent is drawn to an emulsion and cosmetic composition for skin comprising the same ingredients including the same emulsifier as herein, a dimethicone copolyol, in the same amounts. Thus, the emulsions and cosmetic compositions of the patent and in the instant application are seen to substantially overlap. While the patented claims do not recite the specific dimethicone copolyol as recited in the instant claims, Mellul et al. teaches that it is known to provide the instantly claimed dimethicone copolyol emulsifier in an emulsion composition, as has been discussed above. Accordingly, one of ordinary skill in the art would find it obvious to provide the emulsifier of Mellul et al. in the patented composition to arrive at the instantly claimed composition, with the expectation of preparing a suitable emulsion composition, and thus the instant claims 1-9 and 23-33 are seen to be obvious over claims 1-34 of U.S. Patent No. 6,562,354 in view of Mellul et al.

Claims 1-33 are rejected under the judicially created doctrine of obvious-type double patenting as being unpatentable over claims 1-26 of U.S. Patent No. 6,239,174 in view of U.S. Patent No. 5,851,539 to Mellul et al, issued December 22, 1998.

The conflicting claims are not patentably distinct from each other because the patent is drawn to an emulsion and cosmetic composition for skin comprising the same ingredients including the same emulsifier as herein, a dimethicone copolyol in the same amounts, and the same method or process of use of the composition as instantly claimed. Thus, the emulsions and cosmetic compositions and methods of the patent and the instant application are seen to substantially overlap. While the patented claims do not recite the specific dimethicone copolyol as recited in the instant claims, Mellul et al. teaches that it is known to provide the instantly claimed dimethicone copolyol emulsifier in an emulsion composition, as has been discussed above. Accordingly, one of ordinary skill in the art would find it obvious to provide the emulsifier of Mellul et al. in the patented composition to arrive at the instantly claimed composition, with the expectation of preparing a suitable emulsion composition, and thus the instant claims 1-33 are seen to be obvious over the claims 1-26 of U.S. Patent No. 6,239,174.

### ***Response to Arguments***

Applicant's arguments with respect to claims 1-33 have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

No claims are allowed.

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. In particular, U.S. Patent Nos. 6,649,577, 6,793,929 and 6,383,503 to Bleckmann et al. teach water-in-oil emulsions with a water and water-soluble content of at least 80% and having an emulsifier (see abstracts, in particular), JP 10-12054 to Sato et al, published May 12, 1998, teaches an emulsion having a silicone surfactant that can be ~~KE~~-6015 from Shin Etsu (see abstract and paragraph 0009 of machine translation, in particular.)

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

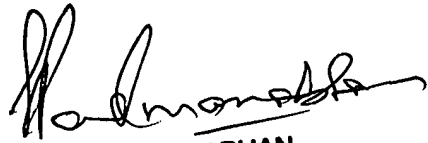
extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Abigail M. Cotton whose telephone number is (571) 272-8779. The examiner can normally be reached on 9:30-6:00, M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreenivasan Padmanabhan can be reached on (571) 272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

AMC

  
**SREENI PADMANABHAN**  
**SUPERVISORY PATENT EXAMINER**